Eu Boon Yeap & Ors v Ewe Kean Hoe

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P–02–1085 OF 2005
MOKHTAR SIDIN, LOW HOP BING AND RAUS SHARIF JJCA
19 SEPTEMBER 2007

Evidence — Burden of proof — Shifting of — Probate of will — Proof of testamentary incapacity of deceased — Burden of proving testamentary capacity and due execution — Whether lies on propounder of will — Whether burden of proof may shift from challenger or impugner to propounder

Evidence — Expert evidence — Handwriting — Whether trial judge correctly declined to accept expert evidence in preference for direct evidence of disinterested witnesses

Succession — Probate — Testamentary capacity — Suspicious circumstances surrounding making of will — Whether testamentary capacity and due execution proved — Discrepancies in description of property and address of deceased — Whether will was forged

Eu Chin Eow ('the deceased') died on 10 December 1995 aged 80 years old, survived by his son and daughter (the first and second appellants/defendants respectively) and wife ('the third appellant/defendant'). The respondent who was the plaintiff in the court below was the nephew of the deceased. The plaintiff had claimed to probate the alleged will of the deceased dated 26 November 1990 ('the will'). The defendants counterclaimed that the alleged will was invalid and that the deceased died intestate, and was survived by the defendants as beneficiaries. The trial court accepted the evidence adduced for the plaintiff through five witnesses viz SP2 to SP6. The cumulative effect of their evidence was that the deceased had given instructions for the will to be drawn up and that the deceased had duly executed the will. The High Court thus allowed the plaintiff's claim to probate and refused the defendants' counterclaim. The defendants appealed. Among the arguments of the defendants were: (1) the purported signature of the testator appearing in the said will was a forgery and that in the premises the will was invalid and of no effect; (2) the deceased's Hokkien was not a local Hokkien but that of Eng Choon Hokkien and thus, he could not have given the particulars of the land to the lawyer as he was not familiar with the

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English and Malay languages; (3) the deceased's execution of the will was a result of testamentary incapacity, as the deceased was not of good health, sound mind, memory and understanding, being 75 years old and was suffering from senile dementia aggravated by his ill-health; (4) there was misdirection by the trial court in placing upon the defendants the burden of proving the deceased's testamentary incapacity when the defendants were only required to question the deceased's mental capacity; (5) the trial court had failed to appreciate that the plaintiff had to prove affirmatively that the deceased knew and approved of the contents of the will; (6) the deceased's property was described as 'undivided share in the rubber estate in Teluk Bahang, Penang known as Lot 83 and Lot 488 Mukim 2 South West District, Penang' in the will, when the property was not a rubber estate and the deceased owned the whole property; and (7) the deceased could not have given the particulars of the property to the lawyers as the deceased did not have the title deed.

Held, by majority dismissing the appeal with costs:

(1) (per **Low Hop Bing JCA**, **Raus Sharif JCA** concurring) There was no misdirection by the trial court in holding that the defendants bear the burden of establishing the deceased's testamentary incapacity as an extraneous vitiating element. It needs also to be observed that such burden of proof may shift from the challenger or impugner to the propounder as explained in *Waring* (see para 51); *Waring v Waring* (1848) 13 ER 715 followed.

(2) (per **Low Hop Bing JCA**, **Raus Sharif JCA** concurring) The trial court's specific finding of facts based on the acceptance of the evidence adduced for the plaintiff as credible, in preference to the evidence adduced for the defendant, was free from any error. The trial court was correct in holding that the plaintiff, as the propounder of the will, had discharged the burden of proving due execution of the will (see paras 72–73).

(3) (per **Low Hop Bing JCA**, **Raus Sharif JCA** concurring) SD3's evidence as a handwriting expert must be viewed in the light of the evidence of the plaintiff's disinterested witnesses who had actually seen the signing of the will by the deceased and that the trial court had found these witnesses to be credible witnesses (see para 75). The trial court had therefore correctly declined to accept SD3's evidence, and rightly held that the defendants had failed to discharge the burden of proving forgery (see para 78).

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(4) (per **Low Hop Bing JCA**, **Raus Sharif JCA** concurring) On the issues of testamentary incapacity, due execution and forgery, there was no appealable error on the part of the trial court to warrant any appellate interference (see para 82).

(5) (per **Low Hop Bing JCA**, **Raus Sharif JCA** concurring) The description of the property as 'rubber estate' and 'undivided share' and the different addresses alluded were minor discrepancies which did not give rise to any doubt in relation to the identity of the property, as the material particulars such as the lot numbers, the mukim and the district had been accurately and specifically stated in the will. There was no uncertainty or ambiguity in the contents of the will. Hence, the validity of the will was in no way negated (see para 86).

(6) (per **Low Hop Bing JCA**, **Raus Sharif JCA** concurring) The plaintiff as propounder of the will bore the burden of dispelling any suspicious circumstance that may surround the making of the will. This burden may be discharged by showing that the deceased being of competent mind, had his will read over to him or that the deceased knew and approved of the contents of the will. Since the trial court had accepted the evidence of SP2 to SP6 and arrived at a specific finding of fact that the will had been read over to the deceased and the deceased understood the dispositions of the will, after which he had executed the will as his will, there was an end to any and all of the so-called suspicious circumstances and indeed all other collateral issues raised against the validity of the will (see paras 92–94).

(7) (per **Mokhtar Sidin JCA** dissenting) Where the validity of a will is challenged, the burden of proving testamentary capacity and due execution lies on the propounder of the will as does the burden of dispelling any suspicious circumstances that may surround the making of the will. However, the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lies on those who challenge the will, in this case the defendants (see para 10); *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 followed. In the present appeal, there should not be any doubt that it was sufficient for the appellants, as the party challenging the will, to call into question either by way of pleadings or evidence, the mental capacity of the deceased. The appellants had clearly by their pleadings and evidence raised the issue as to the testamentary capacity of the deceased. The moment the capacity is called into question, the onus lies on the respondent as the party propounding the purported will to affirm positively the testamentary capacity of the deceased. The appellants were in law not obliged to adduce any medical report to show that the deceased lacked testamentary capacity or was insane at the relevant time as it was incumbent upon the respondent, as

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'the propounder of the alleged will to satisfy the court that the deceased had testamentary capacity at the material time' (see para 13).

(8) (per **Mokhtar Sidin JCA** dissenting) The learned trial judge in accepting the evidence that the deceased had 'given instructions for the said will to be drawn up and that the deceased executed the said will' as demonstrating the deceased's testamentary capacity, had failed to appreciate that such evidence by itself did not discharge the burden of proof where there was suggestion to the contrary and where the factum was not regular or the will not in ordinary form. The suggestion to the contrary and the fact that the alleged will was not in ordinary form did point towards the burden of proving testamentary capacity remaining with the respondent. In the face of the irregular features of the alleged will, and in particular the acknowledgment of SP6 that the instruction given by the deceased was wrong, it was incumbent upon the respondent to establish affirmatively that the deceased did have the testamentary capacity at the time of the purported instructions or the purported execution. In the absence of any evidence, medical or otherwise, the trial judge was not justified to place the burden of proof on the appellants when he held that the appellants had not adduced any medical report to show that the deceased lacked testamentary capacity or was insane at the relevant time (see paras 15–16).

(9) (per **Mokhtar Sidin JCA** dissenting) Since the appellants had clearly by their pleadings and evidence raised the issue as to the knowledge and approval of the deceased of the contents of the alleged will, it was incumbent upon the respondent, as the party propounding the alleged will, to prove affirmatively that the deceased knew and approved of the contents of the alleged will. The burden of proof on the respondent was heavier in the light of the acknowledgement by the respondent's own witness SP6 that there was a material discrepancy in the description of the property in the alleged will and that the instruction given by the deceased, ie that the land was a rubber estate and that he had a share in the rubber estate, was wrong. In this case, the respondent had failed to prove affirmatively that the deceased knew and approved of the contents of the alleged will (see paras 19–20). Furthermore the grave doubt about the deceased's knowledge and approval of the contents of the alleged will was further highlighted by the fact that there was nothing in the attestation clause of the alleged will to indicate that the will was explained to the deceased, considering that the deceased was illiterate in English (see para 22).

(10) (per **Mokhtar Sidin JCA** dissenting) In the present appeal, it was not disputed that the deceased signed the alleged will in a coffee shop below the solicitor's office. Though a will could be attested anywhere, it was unusual for the signing of a will which needed explanation and

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translation to an old man, to be executed in a coffee shop amidst all the noise from the customers. Secondly, the solicitor who came down to attest the said will was not the solicitor to whom the deceased had allegedly given instructions to draw out the will. The solicitor who attested the will was not an official interpreter. Thirdly, it was indeed questionable why the will had to be attested in the coffee shop where the court was not far away from the coffee shop and an official interpreter was available at the court. Lastly, the respondent claimed that the deceased complained to the respondent and his mother that he was treated badly by his own family. No other evidence was adduced by the respondent to corroborate that piece of evidence. As could be seen from the evidence it was the respondent's mother who played an active part in involving the deceased in preparing the alleged will such as supplying the respondent's identity card to the lawyer. In the circumstances, the learned trial judge could not possibly have satisfied himself that the deceased, if at all, had executed the alleged will, knew and approved of the contents of the alleged will. If at all, there had been due execution, the fact that the will had been explained to the deceased, or that the deceased signed the will after the contents had been explained to the deceased or the fact that it was possible that the deceased could speak or understand Hokkien, did not, as a matter of law, furnish the affirmative proof that the deceased knew and approved of the contents of the alleged will (see paras 25–26).

(11) (per **Mokhtar Sidin JCA** dissenting) As the appellants had clearly by their pleadings and evidence raised the issue as to the suspicious circumstances surrounding or relevant to the preparation and execution of the alleged will, there had been misdirection on the part of the trial judge in holding that it was unnecessary to deal with the suspicious circumstances as these 'have been considered and dealt with under the headings of testamentary capacity and due execution'. Apart from the misdirection on the part of the trial judge in failing to address the suspicious circumstances, it was clear that there had been no judicial appreciation of the evidence when the trial judge held that the suspicious circumstances 'were all circumstantial and some were mere conjectures and speculation'. Contrary to the trial judge's observation, the suspicious circumstances surrounding or relevant to the preparation and execution of the alleged will were indeed factual and far too overwhelming to dispel (see para 28).

(12) (per **Mokhtar Sidin JCA** dissenting) In the circumstances, and given the material discrepancy in the description of the property in that the deceased did not own an undivided share in the property mentioned, and in the absence of any evidence as to whether the deceased knew the meaning of undivided share, or his intention in respect of the property he owned, the alleged will was uncertain or ambiguous.

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Consequentially, no probate could therefore be ordered or enforced in respect of the alleged will (see para 35).

(13) (per **Mokhtar Sidin JCA** dissenting) The test carried out by SD3 was unsatisfactory because it was based only on one document and not several documents bearing the signatures of the deceased. In view of this, the learned judge was correct in holding that the appellants had failed to prove the signature of the deceased on the will was a forgery. However the issue of forgery would come into play only after the respondent had discharged his burden of proof in respect of testamentary capacity. In the present appeal the respondent had failed to discharge the burden on him (see paras 37–38).

[Bahasa Malaysia summary

Eu Chin Eow ('si mati') telah meninggal dunia pada 10 Disember 1995 pada umur 80 tahun, meninggalkan anak lelaki dan anak perempuan (perayu-perayu/defendan-defendan pertama dan kedua masing-masingnya) dan isteri ('perayu/defendan ketiga'). Responden yang merupakan plaintif di Mahkamah Tinggi merupakan anak saudara lelaki si mati. Plaintif telah menuntut untuk memohon probet terhadap wasiat si mati yang dikatakan bertarikh 26 November 1990 ('wasiat'). Defendan-defendan telah menuntut balas bahawa wasiat yang dikatakan itu tidak sah dan bahawa si mati telah meninggal dunia tanpa wasiat, dan meninggalkan defendan-defendan sebagai benefisiari. Mahkamah perbicaraan telah menerima keterangan yang dikemukakan untuk plaintif melalui lima orang saksi iaitu SP2 hingga SP6. Kesan kumulatif keterangan mereka adalah bahawa si mati telah memberikan arahan agar wasiat itu dibuat dan bahawa si mati telahpun menyempurnakan wasiat itu. Mahkamah Tinggi oleh itu telah membenarkan tuntutan plaintif untuk probet dan menolak tuntutan balas defendan-defendan. Defendan-defendan telah merayu. Antara hujah-hujah defendan-defendan adalah: (1) tanda tangan pewasiat yang dilihat dalam wasiat itu adalah palsu dan bahawa dalam premis itu wasiat tersebut adalah tidak sah dan tidak berkuat kuasa; (2) bahasa Hokkien si mati bukan bahasa Hokkien tempatan tetapi Hokkien Eng Choon dan oleh itu, beliau tidak mungkin telah memberikan butir-butir tanah itu kepada peguam kerana beliau tidak fasih berbahasa Inggeris dan Melayu; (3) penyempurnaan wasiat si mati adalah disebabkan menurut keupayaan perwasiatan, kerana si mati tidak sihat, tidak waras, mudah lupa dan kurang pemahaman, memandangkan beliau berumur 75 tahun dan mengalami penyakit nyanyuk demensia yang ditambah pula dengan keadaannya yang tidak sihat; (4) berlaku salah arah oleh mahkamah perbicaraan dalam meletakkan defendan-defendan beban untuk membuktikan ketidakupayaan perwasiatan si mati walhal defendan-defendan hanya dikehendaki menyoal tentang kapasiti pemikiran si mati; (5) mahkamah perbicaraan gagal untuk menyedari bahawa plaintif perlu

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membuktikan bahawa si mati mengetahui dan bersetuju dengan kandungan wasiat itu; (6) hartanah si mati digambarkan sebagai 'undivided share in the rubber estate in Teluk Bahang, Penang known as Lot 83 and Lot 488 Mukim 2 South West District, Penang' dalam wasiat itu, walhal hartanah itu bukan estet getah dan si mati memiliki keseluruhan hartanah itu; dan (7) si mati tidak mungkin memberikan butir-butir hartanah itu kepada peguam kerana si mati tidak mempunyai surat ikatan hak milik.

Diputuskan, oleh majoriti dengan menolak rayuan dengan kos:

(1) (oleh **Low Hop Bing HMR**, **Raus Sharif HMR** bersetuju) Tiada salah arah oleh mahkamah perbicaraan dalam memutuskan bahawa defendan-defendan mempunyai beban untuk membuktikan ketidakupayaan perwasiatan si mati satu elemen yang tidak berkaitan tidak sah. Ia juga perlu diteliti bahawa beban bukti sedemikian mungkin berpindah daripada pencabar atau penyoal kepada orang yang mengemukakan wasiat seperti yang dijelaskan dalam *Waring* (lihat perenggan 51); *Waring v Waring* (1848) 13 ER 715 diikut.

(2) (oleh **Low Hop Bing HMR**, **Raus Sharif HMR** bersetuju) Penemuan fakta spesifik mahkamah perbicaraan berdasarkan penerimaan keterangan yang dikemukakan bagi pihak plaintif sebagai suatu yang boleh dipercayai, berbanding dengan keterangan yang dikemukakan bagi pihak defendan, bebas daripada apa-apa kesilapan. Mahkamah perbicaraan adalah betul dalam memutuskan bahawa plaintif, sebagai orang yang mengemukakan wasiat, telah melepaskan beban pembuktian penyempurnaan wasiat tersebut (lihat perenggan 72–73).

(3) (oleh **Low Hop Bing HMR**, **Raus Sharif HMR** bersetuju) Keterangan SD3 sebagai pakar tandatangan hendaklah dilihat dengan keterangan saksi-saksi berkecuali plaintif yang telah melihat penandatanganan sebenar wasiat oleh si mati dan bahawa mahkamah perbicaraan mendapati saksi-saksi tersebut merupakan saksi-saksi yang boleh dipercayai (lihat perenggan 75). Mahkamah perbicaraan dengan itu adalah betul apabila menolak penerimaan keterangan SD3, dan sewajarnya memutuskan bahawa defendan-defendan telah gagal melepaskan beban pembuktian pemalsuan (lihat perenggan 78).

(4) (oleh **Low Hop Bing HMR**, **Raus Sharif HMR** bersetuju) Berhubung isu-isu ketidakupayaan perwasiatan, pelaksanaan dan pemalsuan, tiada kesilapan yang boleh dirayu di pihak mahkamah untuk mewajarkan apa-apa campur tangan pihak rayuan (lihat perenggan 82).

(5) (oleh **Low Hop Bing HMR**, **Raus Sharif HMR** bersetuju) Gambaran hartanah itu sebagai 'rubber estate' dan 'undivided share' dan alamat-alamat yang berbeza secara tidak langsung menyebut tentang

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perbezaan kecil yang tidak menimbulkan apa-apa keraguan berkaitan identiti hartanah itu, kerana butir-butir penting seperti nombor-nombor lot, mukim dan daerah adalah tepat dan dinyatakan secara spesifik dalam wasiat itu. Tiada apa-apa yang tidak jelas atau kabur dalam kandungan wasiat itu, Justeru itu, kesahan wasiat itu tidak disangkal (lihat perenggan 86).

(6) (oleh **Low Hop Bing HMR**, **Raus Sharif HMR** bersetuju) Plaintif sebagai orang yang mengemukakan wasiat itu mempunyai beban menunjukkan tiada apa-apa keadaan yang mencurigakan yang mungkin timbul semasa membuat wasiat itu. Beban ini boleh dilepaskan dengan menunjukkan bahawa si mati dengan fikiran waras telah meminta wasiatnya dibacakan kepadanya atau bahawa si mati mengetahui dan bersetuju dengan kandungan wasiat tersebut. Memandangkan mahkamah perbicaraan menerima keterangan SP2 hingga AP6 dan tiba kepada penemuan fakta spesifik bahawa wasiat itu telahpun dibacakan kepada si mati dan si mati memahami kecenderungan wasiat itu, selepas itu di mana ia telah menyempurnakan wasiat itu sebagai wasiat beliau, maka ia mengakhiri apa-apa dan semua keadaan yang mencurigakan dan sememangnya semua isu-isu kolateral lain yang ditimbulkan tentang kesahan wasiat itu (lihat perenggan 92–94).

(7) (oleh **Mokhtar Sidin HMR** menentang) Di mana kesahan wasiat itu dicabar, beban membuktikan keupayaan perwasiatan dan pelaksanaan sewajarnya terletak ke atas orang yang mengemukakan wasiat itu sebagaimana beban untuk melenyapkan apa-apa keadaan yang mencurigakan yang mungkin menyelubungi pembuatan wasiat itu. Namun, beban membuktikan elemen yang tidak berkaitan yang tidak sah seperti pengaruh tidak wajar, fraud atau pemalsuan terletak ke atas sesiapa yang mencabar wasiat itu, dalam kes ini defendan-defendan (lihat perenggan 10); *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 diikut. Dalam rayuan semasa, tidak sepatutnya timbul sebarang keraguan bahawa ia mencukupi untuk perayu-perayu, sebagai pihak yang mencabar wasiat itu, untuk mengemukakan persoalan sama ada melalui pliding atau keterangan, kapasiti mental si mati. Perayu-perayu jelas melalui pliding dan keterangan mereka telah menimbulkan isu berhubung keupayaan perwasiatan si mati. Tatkala kapasiti dipanggil untuk dipersoalkan, beban terletak ke atas responden sebagai pihak yang mengemukakan wasiat yang dipersoalkan untuk mengesahkan secara positif keupayaan perwasiatan si mati. Perayu-perayu dari segi undang-undang tidak bertanggungjawab untuk mengemukakan apa-apa laporan perubatan untuk menunjukkan bahawa si mati tiada keupayaan perwasiatan atau tidak waras kerana ia wajib ke atas responden, sebagai 'the propounder of the alleged will to satisfy the court that the deceased had testamentary capacity at the material time' (lihat perenggan 13).

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(8) (oleh **Mokhtar Sidin HMR** menentang) Hakim perbicaraan yang bijaksana dalam menerima keterangan bahawa si mati telah 'given instructions for the said will to be drawn up and that the deceased executed the said will' sebagai menunjukkan keupayaan perwasiatan si mati, telah gagal untuk menyedari bahawa keterangan sebegini dengan sendirinya tidak melepaskan beban bukti di mana cadangan bertentangan dan di mana faktum tidak teratur atau wasiat itu bukan dalam bentuk biasa. Cadangan bertentangan dan fakta bahawa wasiat itu bukan dalam bentuk biasa tidak menunjukkan beban keupayaan perwasiatan kekal bersama responden. Berdasarkan ciri-ciri wasiat itu yang tidak teratur, dan khususnya pengesahan SP6 bahawa arahan yang diberikan oleh si mati adalah salah, ia adalah wajib ke atas responden untuk membuktikan secara positif bahawa si mati sememangnya mempunyai keupayaan perwasiatan pada masa arahan-arahan yang dipersoalkan itu atau pelaksanaan yang dipersoalkan itu, Dalam ketiadaan apa-apa keterangan, perubatan atau sebaliknya, hakim perbicaraan tidak dijustifikasikan untuk meletak beban bukti ke atas perayu-perayu semasa memutuskan bahawa perayu-perayu tidak mengemukakan apa-apa laporan perubatan untuk menunjukkan bahawa si mati tiada keupayaan perwasiatan atau tidak waras pada masa berkaitan (lihat perenggan 15–16).

(9) (oleh **Mokhtar Sidin HMR** menentang) Memandangkan perayu-perayu jelas melalui pliding dan keterangan mereka telah menimbulkan isu berhubung pengetahuan dan persetujuan si mati tentang kandungan wasiat yang dikatakan itu, ia adalah wajib ke atas responden, sebagai pihak yang mengemukakan wasiat itu, membuktikan secara positif bahawa si mati mengetahui dan mempersetujui kandungan wasiat tersebut. Beban bukti ke atas responden lebih berat berdasarkan pengesahan oleh saksi responden sendiri SP6 di mana terdapat percanggahan dalam gambaran hartanah itu dalam wasiat yang dikatakan dan bahawa arahan yang diberikan oleh si mati, iaitu bahawa tanah itu merupakan estet getah dan bahawa beliau mempunyai bahagian dalam estet getah itu, adalah salah. Dalam kes ini, responden telah gagal untuk membuktikan secara positif bahawa si mati mengetahui dan mempersetujui kandungan wasiat yang dikatakan itu (lihat perenggan 19–20). Tambahan pula keraguan tentang pengetahuan dan persetujuan si mati terhadap kandungan wasiat itu diperbesarkan oleh fakta bahawa tiada apa-apa dalam klausa pengakuan kepada wasiat itu yang menunjukkan wasiat itu telah dijelaskan kepada si mati, dengan mengambilkira bahawa si mati tidak memahami bahasa Inggeris (lihat perenggan 22).

(10) (oleh **Mokhtar Sidin HMR** menentang) Dalam rayuan ini, ia tidak dipertikaikan bahawa si mati telah menandatangani wasiat itu dalam sebuah kedai kopi di bawah pejabat peguam. Meskipun suatu wasiat itu

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boleh diakui di mana-mana, ianya pelik untuk menandatangani wasiat yang memerlukan penjelasan dan penterjemahan kepada seorang tua, untuk dilaksanakan dalam sebuah kedai kopi yang bising dengan pelanggan. Keduanya, peguam yang turun untuk mengakui wasiat tersebut bukanlah peguam yang mana si mati telah memberikan arahan untuk menyediakan wasiat itu. Peguam yang mengakui wasiat itu bukanlah jurubahasa rasmi. Ketiga, sememangnya adalah dipersoalkan kenapa wasiat itu telah diakui dalam kedai kopi di mana mahkamah tidak berjauhan daripada kedai kopi itu dan jurubahasa rasmi sedia ada di mahkamah itu. Akhirnya, responden mendakwa bahawa si mati mengadu kepada responden dan ibunya bahawa beliau tidak dilayan dengan baik oleh keluarganya sendiri. Tiada keterangan lain yang telah dikemukakan oleh responden untuk menyokong keterangan tersebut. Sebagaimana dilihat daripada keterangan tersebut ibu respondenlah yang telah memainkan peranan aktif dalam melibatkan si mati menyediakan wasiat yang dikatakan itu seperti mengemukakan kad pengenalan responden kepada peguam. Dalam keadaan sedemikian, hakim perbicaraan yang bijaksana tidak mungkin telah meyakinkan dirinya bahawa si mati, jika apa sekalipun, telah melaksanakan wasiat tersebut, mengetahui dan mempersetujui kandungan wasiat tersebut. Jika apa sekalipun, telah berlaku pelaksanaan sewajarnya, hakikat bahawa wasiat itu telah dijelaskan kepada si mati, atau si mati telah menandatangani wasiat itu selepas kandungannya diterangkan kepada si mati atau hakikat bahawa ianya mungkin bahawa si mati boleh bertutur atau memahami bahasa Hokkien, tidak, dari segi undang-undang, memberikan bukti positif bahawa si mati mengetahui dan mempersetujui kandungan wasiat tersebut (lihat perenggan 25–26).

(11) (oleh **Mokhtar Sidin HMR** menentang) Oleh kerana perayu-perayu dengan jelas melalui pliding dan keterangan mereka telah menimbulkan isu berhubung keadaan mencurigakan yang menyelubungi keadaan atau berkaitan dengan penyediaan dan pelaksanaan wasiat tersebut, telah berlaku salah arah di pihak hakim perbicaraan dalam memutuskan bahawa ia tidak perlu membincangkan keadaan mencurigakan tersebut kerana ianya 'have been considered and dealt with under the headings of testamentary capacity and due execution'. Selain daripada salah arah di pihak hakim perbicaraan kerana gagal mengutarakan keadaan mencurigakan itu, ia jelas tiada kesedaran kehakiman terhadap keterangan itu apabila hakim perbicaraan memutuskan bahawa keadaan mencurigakan itu 'were all circumstantial and some were mere conjectures and speculation'. Bertentangan dengan penelitian hakim perbicaraan, keadaan mencurigakan sekeliling atau berkaitan dengan penyediaan dan pelaksanaan wasiat tersebut sememangnya faktual dan terlalu ketara untuk dilenyapkan (lihat perenggan 28).

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(12) (oleh **Mokhtar Sidin HMR** menentang) Dalam keadaan sedemikian, dan berdasarkan percanggahan ketara dalam gambaran hartanah itu di mana si mati tidak memiliki sebahagian yang tidak dibahagikan dalam hartanah yang disebutkan, dan dalam ketiadaan apa-apa keterangan berhubung sama ada si mati mengetahui maksud bahagian yang tidak dibahagikan, atau niatnya berhubung hartanah yang beliau miliki, wasiat yang dikatakan itu adalah tidak jelas atau kabur. Berikutan itu, tiada probet boleh dibenarkan atau dikuatkuasakan berhubung wasiat tersebut (lihat perenggan 35).

(13) (oleh **Mokhtar Sidin HMR** menentang) Ujian yang dijalankan oleh SD3 tidak memuaskan kerana ia hanya berdasarkan satu dokumen dan bukan beberapa dokumen yang mempunyai tandatangan si mati. Berdasarkan ini, hakim yang bijaksana adalah betul dalam memutuskan bahawa perayu-perayu telah gagal untuk membuktikan tandatangan si mati atas wasiat itu adalah palsu. Namun, isu pemalsuan hanya timbul selepas responden dilepaskan beban buktinya berhubung keupayaan perwasiatan. Dalam rayuan ini responden telah gagal untuk melepaskan beban ke atasnya (lihat perenggan 37–38).]

Notes

For cases on handwriting, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1465–1473.

For cases on shifting of burden of proof, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 578–587.

For cases on testamentary capacity, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2568–2579.

Cases referred to

Dr Shanmuganthan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61 (refd)

Fulton v Andrew (1874–75) LR 7 HL 448 (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1 (refd)

Kameswara Rao v Suryaprakasarao AIR 1962 AP 178 (refd)

Kenward v Adams The Times 19 November 1975, Current Year Book 1975 (refd)

Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors [1998] 3 MLJ 457 (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97 (folld)

Morris (deceased), In Re [1971] p 62 (refd)

Mortibai Hormusjee v Jamesetjee AIR 1924 PC 28 (refd)

Newton v Ricketts (1861) 11 ER 731 (refd)

Simpson (deceased), In re Vol 121 Solicitor's Journal, No 13, 1 April 1997 (refd)

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A *Surendra Pal v Saraswati Arora* AIR 1974 SC 1999 (refd)
Tyrrell v Painton [1894] P 151 (refd)
Udham Singh v Indar Kaur [1971] 2 MLJ 263 (refd)
Waring v Waring (1848) 13 ER 715 (folld)
William Henry Bailey & Ors v Charles Lindsay Bailey & Ors (1924) 34 CLR
B 558 (refd)

Legislation referred to
Rules of the High Court 1980 O 71 rr 9(1), 10

C

Appeal from: Civil Suit No 22–290 of 1996 (High Court, Pulau Pinang)

JA Yeoh (JJ Chan with him) (Shearn Delamore & Co) for the appellants.
Ooi Soo Jit (Wong-Chooi & Mohd Nor) for the respondent.

D **Mokhtar Sidin JCA:**

[1] Briefly, the appeal before us concerns the decision of the High Court in allowing the respondent's claim to probate in respect of the alleged will of
E Eu Chin Eow, deceased, dated 26 November 1990 and in refusing the appellants' counterclaim that the alleged will is invalid and that the deceased died intestate. The said Eu Chin Eow ('the deceased') died on 10 December 1995 aged 80 years old, survived by his eldest son Eu Boon Yeap the first appellant, his daughter Eu Siew Cheng the second appellant and his wife Ong
F Sin Kheng, the third appellant. At the time of the deceased's purported execution of the alleged will dated 26 November 1990, the deceased was 75 years old.

[2] The respondent in the present appeal, the plaintiff in the court below,
G filed a writ of summons dated 11 September 1996 against the first appellant. He is the nephew of the deceased and the statement of claim reads:

(1) Plaintif ialah wasi yang dilantik di dalam wasiat terakhir Eu Chin Eow, si mati beralamat di No 3 Jalan Padang Tembak, Pulau Pinang yang
H meninggal dunia pada 10 Disember 1995, wasiat tersebut adalah bertarikh 26 November 1990.

(2) Plaintif menafikan kepentingan defendan yang dinyatakan di kaveat yang dibuat oleh peguamcara defendan bertarikh 13 Mei 1996, sitasi
I yang difailkan oleh defendan pada 13 Jun 1996 dan afidavit Eu Boon Yeap bertarikh 13 Jun 1996 terhadap petisyen probet No 32–66–1996 di Mahkamah Tinggi, Pulau Pinang untuk harta pesaka Eu Chin Eow, si mati.

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(3) Oleh itu, plaintif menuntut:

(a) bahawa mahkamah mengdekrikan probet wasiat Eu Chin Eow bertarikh 26 November 1990;

(b) gantirugi-gantirugi;

(c) kos-kos; dan

(d) relif selanjutnya yang mahkamah mulia ini anggap sesuai dan suaimanfaat.

[3] The first appellant then filed the following defence and counterclaim:

(1) As regards para 1 of the statement of claim, the defendant denies that the plaintiff was lawfully appointed as sole executor and trustee of the will of Eu Chin Eow dated 26 November 1990. The defendant avers that the said Eu Chin Eow died intestate on 10 December 1995 and is survived by the following beneficiaries:

(i) Ong Sin Kheng — lawful widow;

(ii) Eu Siew Hua — lawful daughter;

(iii) Eu Boon Yeap — lawful son;

(iv) Eu Siew Cheng — lawful daughter.

(2) Defendant further avers that the purported signature of the testator appearing in the said will is a forgery and that in the premises the will is invalid and of no effect.

(3) As regards para 2 of the statement of claim, the defendant avers that the said caveat dated 13 May 1996 was entered to ensure that no grant was made without notice to himself and that the said citation dated 13 June 1996 was a necessary step taken by the defendant in order to have the Probate granted to the plaintiff on 13 May 1996 called in, revoked and declared null and void in law.

(4) Save and except as is expressly admitted herein the defendant denies each and every allegation in the statement of claim as if the same were herein set forth seriatim and specifically traversed.

(5) The defendant therefore prays the claims be dismissed with costs.

COUNTERCLAIM

(6) The defendant repeats paras 1 to 5 of the defence and counterclaims against the plaintiff as follows:

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(i) A declaration that the will dated 26 November 1990 is null and void in law on the ground of forgery;

(ii) A declaration that Eu Chin Eow died intestate and is survived by the lawful beneficiaries as pleaded in para 1 of the defence;

(iii) Damages;

(iv) Costs;

(v) Further or other relief.

[4] The second and third appellants filed their defence and counterclaim dated 30 July 1999 which reads:

(1) Save and except that the plaintiff was named as the sole executor and trustee in the alleged last will and testament dated 26 November 1990, the second and third defendants deny that the said Eu Chin Eow, deceased had ever executed the alleged last will and testament or at all.

(2) Save and except that the first defendant has lodged a caveat against the issuance of probate in respect of the alleged last will and testament dated 26 November 1990 the second and third defendants deny that the interest therein was limited only to that of the first defendant.

(3) Save as is herein expressly admitted, the second and third defendants deny each and every allegation contained in the statement of claim as though the same were herein specifically set out and traversed seriatim.

Wherefore the second and third defendants pray that the statement of claim be dismissed with costs.

COUNTERCLAIM

(4) The second and third defendants repeat paragraphs 1 to 3 of the defence.

(5) The second and third defendants are the lawful widow and daughters respectively of the said Eu Chin Eow, deceased who passed away on 10 December 1995 intestate.

(6) The second and third defendants aver that the alleged last will and testament dated 26 November 1990 did not bear the true and genuine signature of the said Eu Chin Eow, deceased and was a forgery and that the said last will and testament and/or the grant of probate issued in respect thereof are in law invalid and null and void.

(7) The second and third defendants aver that if at all, the alleged last will and testament dated 26 November 1990 was executed by the deceased,

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which is denied, the deceased at the time that the said last will and testament was executed, did not know and approve of the contents of the said will.

PARTICULARS

The said deceased never gave any instructions for the said will and the said will was not read over or properly explained to him, nor did he read or was capable of reading the said will himself before it was executed nor was he aware of the nature and effect nor was he capable of comprehending or appreciating its provisions and effect.

(8) Further and/or in the alternative to paragraph 7 herein, the second and third defendants aver that if at all, the alleged last will and testament dated 26 November 1990 was executed by the deceased, which is denied, the deceased at the time that the said last will and testament was executed, was not of good health, sound mind, memory and understanding.

PARTICULARS

At the time of execution of the said will the deceased was 75 years old and was suffering from ill health, memory loss and senile dementia aggravated by his illness.

The deceased was at the time of execution of the said will in such a condition of mind and memory loss as to be unable to understand the nature of the act and its effect and the extent of the property of which he was disposing or to comprehend and appreciate the provisions and effects of the said will.

(9) Further and/or in the alternative to paragraphs 7 and 8 herein, the second and third defendants aver that, if at all, the alleged last will and testament dated 26 November 1990 was executed by the deceased, which is denied, the execution of the said will was obtained by the fraud of the plaintiff.

PARTICULARS

(i) The plaintiff knows and knew at all material times that the deceased had given no instructions for the preparation of his last will and testament;

(ii) The plaintiff knows and knew at all material times that the deceased was close to his family in particular the second defendant and that the deceased had never been close to the plaintiff or to any members of the plaintiff's family or the plaintiff's parents;

(iii) The plaintiff had upon the deterioration of the deceased's physical, mental and emotional health and without the knowledge and/or approval of the deceased given instructions to the solicitors to prepare the said will;

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(iv) The plaintiff had upon the deterioration of the deceased's physical, mental and emotional health caused and/or induced the deceased to sign the said will when the deceased did not know, approve or comprehend or was capable of knowing, approving or comprehending the provisions and effects of the said will;

(v) The plaintiff had upon the deterioration of the deceased's physical, mental and emotional health caused and/or induced the deceased to sign the said will by falsely and fraudulently representing that the said will was some family document for the benefit of the deceased's wife and children.

(10) Further and/or in the alternative to paragraphs 7, 8 and 9 herein, the second and third defendants aver that, if at all, the alleged last will and testament dated 26 November 1990 was executed by the deceased, which is denied, the execution of the said will was not in accordance with the provisions of the Wills Act 1959.

PARTICULARS

(i) The deceased did not sign or acknowledge his signature to the said alleged will in the joint presence of the two (2) alleged witnesses;

(ii) The alleged witnesses to the said alleged will did not attest and subscribe the said alleged will in the presence of the deceased;

(iii) The second and third defendants put the plaintiff to strict proof that the provisions of the said Wills Act 1959 were duly complied with.

(11) Further and/or in the alternative to paragraphs 8, 9, and 10 herein, the second and third defendants aver that if at all, the alleged last will and testament dated 26 November 1990 was executed by the deceased, which is denied, the said alleged will does not at all reflect the deceased's true will, intention and volition but was procured by the importunity of and/or determined by the plaintiff in consultation with his solicitors without the knowledge and/or approval of the deceased.

(12) Further or in the alternative, the second and third defendants as the lawful unmarried daughter and widow respectively of the deceased claim that such reasonable provision as the court thinks fit be made out of the deceased's net estate pursuant to s 3 of the Inheritance (Family Provision) Act 1971 for the maintenance of the second and third defendants respectively.

(13) By reason of the matters aforesaid, the second and third defendants have thereby suffered loss and damage.

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Wherefore the second and third defendants claim the following:

(i) A declaration that the said alleged last will and testament of the late Eu Chin Eow, deceased dated 16 November 1990 is invalid and that deceased died intestate;

(ii) An order that the grant of probate in respect of the purported last will and testament of deceased granted under Penang High Court Petition No 32–66–1996 be set aside forthwith;

(iii) An order that the plaintiff do take such necessary steps to restore to the estate of the said Eu Chin Eow, deceased all assets, properties and effects belonging to the deceased and/or the documents of title in relation thereto;

(iv) Damages for inducing or procuring the purported last will and testament dated 26 November 1990 and/or damages for fraud;

(v) Further or in the alternative, such reasonable provision as the court thinks fit, be made out of the deceased's net estate pursuant to s 3 of the Inheritance (Family Provision) Act 1971 for the maintenance of the second and third defendants as the lawful unmarried daughter and widow of the said Ew Chin Eow, deceased;

(vi) Costs; and

(vii) Such further and/or other reliefs that may be deemed just and appropriate.

[5] The plaintiff's reply to this is dated 23 August 1999 and reads:

JAWAPAN

(1) Plaintif bergabung isu dengan defendan-defendan kedua dan ketiga di atas mereka melainkan bahagian-bahagian yang terdiri daripada pengakuan.

PEMBELAAN KEPADA TUNTUTAN BALAS

(2) Tuntutan balas defendan-defendan kedua dan ketiga (selepas ini dirujuk sebagai 'defendan-defendan') tidak mendedahkan sebarang kausa tindakan yang munasabah terhadap plaintif dan adalah remeh, menyusahkan dan mengaibkan, akan memudaratkan, memalukan dan melewatkan perbicaraan tindakan ini secara adil, serta menipakan suatu penyalahgunaan proses mahkamah.

(3) Tuntutan balas defendan-defendan adalah berniat jahat, terdorong oleh malis dan ketamakan, direka-reka secara tidak jujur dan frodulen.

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(4) Melainkan bahawa defendan-defendan menipakan anak perempuan dan balu kepada si mati, dakwaan-dakwaan lain di dalam perenggan 5 tuntutan balas adalah dinafikan sama sekali.

(5) Plaintif menafikan dakwaan-dakwaan di dalam perenggan 6, 7, 8, 9, 10, 11 dan 13 tuntutan balas. Dakwaan-dakwaan tersebut adalah palsu belaka dan telah direka oleh defendan-defendan secara tidak jujur setelah defendan pertama tidak dapat membuktikan dakwaan-dakwaan palsunya mengenai pemalsuan tandatangan.

(6) Plaintif mengambil dan mengulangi kandungan 'Pembelaan Kepada Tuntutan Balas' di sini bertarikh 31 Oktober 1996 sebagai sebahagian daripada pembelaannya di sini.

(7) Semasa menandatangani wasiat tersebut, si mati adalah berfikiran wajar dan memahami kandungannya yang telah dibaca, diterjemahkan dan diterangkan oleh salah seorang saksi, Encik Ian Lim Eu Keong (seorang peguamcara) kepadanya. Kesihatan dan keadaan mental si mati pada ketika itu adalah baik dan beliau dapat memahami tindakan beliau sendiri. Beliau telah menandatangani wasiat tersebut secara sukarela. Semua peruntukan Akta Wasiat 1959 telah dipatuhi.

(8) Mengenai perenggan 12 tuntutan balas, defendan-defendan telah melayan si mati secara tidak baik semasa beliau masih hidup dan adalah berkeupayaan menanggung diri. Defendan-defendan dikehendaki membuktikan bahawa mereka berhak dan belum kehilangan hak kepada sebarang peruntukan seperti yang dituntut.

(9) Melainkan seperti yang diperakui secara nyata di atas, plaintif menafikan setiap dakwaan di dalam tuntutan balas defendan-defendan seolah-olah ianya telah dikemukakan di sini dan disangkal secara khususnya.

(10) Dan plaintif memohon agar tuntutan balas defendan-defendan ditolak dengan kos.

[6] After a full hearing, the learned judge allowed the plaintiff's claims in terms of prayer (a) and (c) as set out in the statement of claim and dismissed the defendants' counterclaims. In other words, the learned judge upheld the validity of the will. Against that decision the defendants appealed.

[7] Before us, learned counsel for the defendants/appellants submitted that the learned judge had erred in coming to the conclusion that there was no forgery. In this respect the learned judge in his judgment said:

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The defendants also called the handwriting expert, Mr Siow Kwen Sia (SD3), as their witness to prove that the signature of the deceased in the said will was forged. SD3's reports can be found in exhs D9 and D10. It was his opinion that the questioned signature of the deceased in the said will is of different authorship and that the questioned signature is a copied signature 'because of similarity in general form but differences in fine details'.

In *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* the Court of Appeal has made the following observation on the expert opinion evidence, at p 137:

> We consider it to be a well established general guide to the judicial appreciation of handwriting evidence that where there is a sharp conflict between the direct testimony of a disinterested witness on the one side and that of a handwriting expert on the other as to the genuineness of the execution of a document then it is a safe course for a court to prefer the direct evidence. Thus, in *Newton v Ricketts* (1861) 11 ER 731, it was held as follows:
>
> > Where the genuineness of handwriting to a deed is contested in Chancery, if an affidavit is produced from the sole arresting witness alive that he knew the persons executing the deed, and saw them execute it, and then wrote his own attestation, the fact that persons skilled in handwriting declare their belief, formed on inspection, that the handwriting is not genuine, does not call on that court to grant an issue to try the disputed fact; but it may determine that fact on the opposing affidavits.

In the instant case we have the direct evidence of the disinterested witnesses and as such their evidence should be accepted by this court. In addition there are several weaknesses in the procedure adopted by SD3 when examining the samples given to him. They are as follows:

(a) There was only one specimen in similar form ie specimen E1 being available as comparison to the signature on the said will given to SD3 for examination.

(b) Moreover, E1 and the said will were not signed at the same time. E1 was signed in 1995 but the will was signed on 1990. SD3 himself told the court that:

> Q: A person's signature varies from time to time?
>
> A: It varies slightly from time to time.
>
> Q: For a time lapse of 10 years would it vary?
>
> A: There would be subtle changes over a long period of time.
>
> In this case, the possibility remains that the signature of the deceased had changed from 1990 to 1995.

(c) The subject signature and the sample signature were made by different writing apparatus as the evidence of SD3 confirms that:

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(d) (PI referred). The signature was made by a non ball point pen.

(The original of p 75 shown). The signature was made by a ball point pen.

(e) In the article of *Harcharan Singh Tara* [1995] 3 MLJ 1 it was stated that:

> The writing characteristic of those who have reached writing maturity, may be influenced by many factors like temporary or permanent physical disorders, eyesight, degree of self-control, aesthetic taste, mental disturbances, changes due to sanity.

None of these factors were taken into consideration by SD3 when forming his opinion even though SD3 himself had admitted that the above factors may affect the author's signature.

The failure on the defendants' part to make a police report as soon as possible on the allegation of forgery did also raise doubts as to, whether their claim was bone fide. Despite having ample time and opportunity to seek legal advice and to take appropriate actions it was only on 3 November 2000, 5 years after the demise of the deceased and after the plaintiff has closed his case, that the police report was finally made.

Based on the foregoing reasons I find that there is no substance in the defence's allegation that the signature of the deceased on the said will was forged and I accordingly hold that the said will was duly executed by the deceased.

[8] The defendants' counsel submitted that the learned judge failed to appreciate that with or without the evidence of the handwriting expert, the totality of the evidence, including the evidence of the deceased's children on the deceased's handwriting which remains unchallenged, do support the appellants' claim that the alleged will is indeed a forgery. Learned counsel went on to say that the trial judge's observations on the weaknesses in the procedure adopted by the and writing expert and the defendants' failure to make a police report as soon as possible are irrelevant to the issue whether, in the totality of the evidence, the alleged will is indeed a forgery.

[9] The appellants contended that there had been misdirection on the part of the trial judge in placing upon the appellants the burden of proving testamentary incapacity contrary to settled law on the burden of proof. The appellants are only required to question the mental capacity of the deceased, whether on pleadings or in evidence, but are not obliged in law, contrary to the trial judge's observation, to adduce any medical report to show that the deceased lacked testamentary capacity or was insane at the relevant time. The learned judge in his judgment said:

> It was the defendants' contention that the deceased at the time of the execution of the said will was not of good health, sound mind, memory and understanding as can be gathered from the evidence of the three defendants. All the defendants said

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that in 1990 the deceased's health was generally not good, he was in depression and he had developed the forgetful habit and started collecting rubbish, bottles and used cans and so on.

The plaintiff, on the other hand, through the evidence of SP2, SP3, SP4, SP5 and SP6 have shown that the deceased gave the instruction for the said will to be drawn up and the deceased executed the said will. SP6, Lim Cheng Chuan, the solicitor who prepared the said will has testified that the deceased gave the instruction to him to draw up the said will. SP3, another solicitor has testified that the deceased had the contents of the will explained to him in Hokkien and the deceased executed the said will. Three other witnesses ie, SP2, SP4 and SP5 testified that they saw the deceased executing the said will.

It is to be noted that the defendants have not adduced any medical report to show that the deceased lack testamentary capacity or was insane at the relevant time. On the other hand under cross-examination SD1 said that in November 1990 her father could walk around and could still go to the bank. SD2 has testified that from 1989 to 1991 the deceased was still able to go to the bank and still able to note down his banking transactions. The deceased went to see the doctor by himself in the 1990s. SD4 in her evidence stated that the deceased had signed the form for the Public Bank Berhad for opening the fixed deposit account on 24 November 1990 which was two days before the date of the said will.

Having carefully considered the evidence before me it is my view that the plaintiff's witnesses have given a credible evidence as to the circumstances leading to the preparation and the execution of the said will. There was no reason for SP3 and SP6, the two solicitors involved in this case, to tell lies in court. I agree with the submission made by learned counsel for the plaintiff that the deceased's ability to sign the bank's form in order to open an account with the bank 2 days before the execution of the said will clearly demonstrates his capacity to understand the nature and consequences of his acts. Accordingly I hold that the deceased did have the requisite testamentary capacity to make the said will.

TESTAMENTARY CAPACITY

[10] It is settled law that where the validity of a will is challenged, the burden of proving testamentary capacity and due execution lies on the propounder of the will as does the burden of dispelling any suspicious circumstances that may surround the making of the will. However, the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lies on those who challenge the will, in this case the defendants. This is so stated by Gopal Sri Ram JCA in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 where at pp 113–116 he said:

THE BURDEN OF PROOF

It is settled law where the validity of a will is challenged, the burden of proving testamentary capacity and due execution lies on the propounder of the will as does the burden of dispelling any suspicious circumstances that may surround the

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making of the will. However, the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lies on those who challenge the will — in this case the plaintiffs.

In *Udham Singh v Indar Kaur* [1971] 2 MLJ 263, the former Federal Court explained what is meant by 'testamentary capacity' and dealt with the question of onus of proof of that element as follows (at pp 264–265):

> In the event, the learned judge pronounced in favour of the will as he decided that the plaintiff had failed to discharge the onus of establishing testamentary incapacity on the part of the testator.
>
> In this appeal, the appellant was correct in his submission that the judge was wrong in placing such an onus on the plaintiff. The plaintiff by his pleadings had clearly raised the issue as to testamentary capacity. A person has testamentary capacity when he understands the nature of his act and its effect; the extent of the property of which he is disposing; the claims to which he ought to give effect; and, with a view to the latter object, no disorder of the mind must poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, and no insane delusion must influence his will in disposing of his property, and bring about a disposal of it which, if the mind had been sound, would not have been made. *(Banks v Goodfellow* (1870) LR 5 QB 565). Once this point was taken, it is clear law that the burden of proving testamentary capacity rested on the defendant. (See *Smee v Smee* (1879) 5 PD 84 at p 91). There was therefore a misdirection on the part of the judge in putting the burden of proving testamentary incapacity in the first instance on the appellant.

In *Waring v Waring* (1848) 13 ER 715 at p 720, Lord Brougham explained how the burden of proof in testamentary cases may shift from one party to the other. He said:

> The burden of the proof often shifts about in the process of the cause, accordingly as the successive steps of the inquiry, leading to inferences decisive, until rebutted, casts on one or the other party the necessity of protecting himself from the consequences of such inferences; nor can anything be less profitable as a guide to our ultimate judgment than the assertion which all parties are so ready to put forward in their behalf severally, that, in the question under consideration, the proof is on the opposite side. Thus, no doubt, he who propounds a latter will undertakes to satisfy the Court of Probate, that the testator made it, and was of sound and disposing mind. But very slight proof of this, where the factum is regular, will suffice; and they who impeach the instrument must produce their proofs, should the party actor, the party propounding, choose to rest satisfied with his prima facie case, after an issue tendered against him. In this event, the proof has shifted to the impugner; but his case may easily shift it back again.

In *Bankim Bihari v Matangini Dasi* AIR 1919 PC 157, Sir John Edge explained what the propounder of a will must establish. He said:

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> It was for the appellant to establish the mental capacity of the testator, *that he understood* the *dispositions of the will, and that it was duly executed by him as his will.*
>
> (Emphasis added.)

In *Barry v Butlin* (1838) 12 ER 1089, the Privy Council, speaking through Parke B, laid down the two rules governing the nature of the onus of proof placed upon a party propounding a will:

> These rules are two: the first, that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

In the leading case of *Tyrrell v Painton* [1894] P 151 at p 157, Lindley LJ after referring to the two rules laid down in *Barry v Butlin* and to the cases of *Fulton v Andrew* (1874–75) LR 7 HL 448 and *Brown v Fisher* 63 LT 465 said:

> The rule in *Barry v Butlin, Fulton v Andrew*, and *Brown v Fisher* is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and *to prove affirmatively that the testator knew and approved of the contents of the document*, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will.
>
> (Emphasis added.)

As recently as 16 December 2002, the Judicial Committee of the Privy Council had occasion to consider the issue of the nature of the onus upon a propounder of a will to dispel suspicious circumstances. In *Ramcoomarsingh v Administrator General* [2002] UKPC 67, an appeal from the Court of Appeal of Trinidad and Tobago, the board in its advice, delivered by Lord Slynn of Hadley said:

> In *Tyrrell v Painton* [1894] P 151 at p 157, Lindley LJ said that where circumstances exist which excite suspicion the onus is on the person propounding the will to prove that the testator 'knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will'.
>
> But as Lord Hatherley stressed in *Fulton v Andrew* (1874–75) LR 7 HL 448, at p 469 there is no absolutely rigid rule that if a testator of competent mind has had his will read over to him that further injury is shut out but where that is done:

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'very strong evidence is required in opposition to it in order to set aside any instrument so executed'. As Lord Cairns LC put it, at p 463, the duty is to bring home to the mind of the testator the effect of his testamentary act.

A little later, Lord Slynn continued as follows:

> These authorities, and many others to which it is not necessary to make reference since they are on similar lines, make it clear that where a person is in a fiduciary relationship with another who is intending to make a will, that person if he prepares or is closely involved in the preparation of the will or informing the testator's intentions must if the will is challenged satisfy the court that the testator knew and understood what he was doing and that the will has given effect to his intentions. The possibility of undue influence leading to the provision of such a benefit for the person, whether a solicitor or not, but particularly a solicitor, must be ruled out. The simplest way of avoiding the conclusion that there has been such influence is to ensure that an independent legal adviser is consulted by the testator or at any rate to give a clear and recorded opinion that such advice be obtained. But the statement in *Rhodes v Bate* [1886] 1 Ch App 252, at p 257 upon which Permanand JA relies that the persons by whom the benefits have been conferred must be shown to have 'had competent and independent advice in conferring them' goes too far. It is simple and conclusive but other methods showing that the will contains the intention of the testator and that he knew and understood what he was doing may be sufficient to remove the suspicions which have arisen. (Emphasis added.)
>
> To sum up, the effect of the authorities on the subject is that while the onus lies on the propounder of, a will to dispel any suspicious circumstances surrounding the making of the will, that burden may be discharged by showing that the testator, being of competent mind, had his will read over to him *(Fulton v Andrew)* or that the testator knew and approved of the contents of the will *(Tyrrell v Painton)*. One method of dispelling suspicious circumstances where there is a substantial gift to a person who either prepares or is closely involved in the preparation of a will is to show that the testator had obtained independent legal advice. Alternatively, the propounder may by other methods show that the will contains the intention of the testator and that he knew and understood what he was doing and in this way sufficiently remove any suspicions which may have arisen *(Ramcoomarsingh v Administrator General)*.

[11] The appellants had by their pleadings in their counterclaim raised the issue as to the testamentary capacity of the deceased alleging that the deceased at the time of the execution of the alleged will was 75 years old and was suffering from ill health, memory loss and senile dementia aggravated by his illness' and was therefore 'not of good health, sound mind, memory and understanding'. The appellants gave evidence that the deceased was 'in late 1989 suffering from depression and very low blood pressure', 'that his health was not good especially after his hospitalisation in July 1989 where he was critically ill and almost died' and that after his hospitalisation, 'he had developed the forgetful habit and started collecting rubbish, bottles, cans and

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old newspapers'. The trial judge in dismissing the appellants' claim had in his grounds of judgment held that 'the defendants have not adduced any medical report to show that the deceased lacked testamentary capacity or was insane at the relevant time'.

[12] The law, as can be seen from the authorities I have cited above, is that where unsoundness of mind is alleged, the burden of proof on testamentary capacity rests upon the party propounding the will which in the present appeal is the respondent. The passage in *Sarkar's Law of Evidence* (14th Ed), 1993 Vol 2 are in essence is the judgment of Lord Brougham in *Waring v Waring* (1848) 13 ER 715:

> Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases, if there is no suggestion to the contrary, any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question, then at once the onus lies on those propounding the will to affirm positively the testamentary capacity.

[13] In the present appeal, I do not think that there should be any doubt that it is sufficient for the appellants, as the party challenging the will, to call into question either by way of pleadings or evidence, the mental capacity of the deceased. The appellants had clearly by their pleadings and evidence raised the issue as to the testamentary capacity of the deceased. The moment the capacity is called into question, the onus lies on the respondent as the party propounding the purported will to affirm positively the testamentary capacity of the deceased. The appellants are in law not obliged to adduce any medical report to show that the deceased lacked testamentary capacity or was insane at the relevant time as it is incumbent upon the respondent, as 'the propounder of the alleged will to satisfy the court that the deceased had testamentary capacity at the material time'.

[14] The appellants submitted that the appellants do not assume any burden of proof on the deceased's testamentary incapacity until and unless the respondent had established that the deceased did indeed have testamentary capacity, ie 'understands the nature of his act and its effect; the extent of the property of which he is disposing; the claims to which he ought to give effect; and with a view to the latter object no disorder of the mind must poison his affections, pervert his sense of right or prevent the exercise of his natural faculties, and no insane delusion must influence his will in disposing of his property, and bring about a disposal of it which if the mind had been made ...'.

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[15] In my view, the learned trial judge in accepting the evidence that the deceased had 'given instructions for the said will to be drawn up and that the deceased executed the said will' as demonstrating the deceased's testamentary capacity, had failed to appreciate that such evidence by itself does not discharge the burden of proof where there is suggestion to the contrary and where the factum is not regular or the will not in ordinary form. The suggestion to the contrary and the fact that the alleged will is not in ordinary form do point towards the burden of proving testamentary capacity remaining with the respondent. That the burden of proof had not shifted is clear from the following testimony of the respondent and his witnesses:

(a) The respondent himself had admitted under cross-examination that he 'was not sure about the deceased's health', 'did not know for a fact that the deceased was suffering from depression' and 'did not know that after his hospitalisation the deceased had the habit of collecting empty bottles and discarded clothes from the neighbourhood'.

(b) The lawyer, Lim Cheng Chuan (SP6), had under cross-examination admitted that 'he was not aware that the deceased had been hospitalised in 1989 and did not know that the deceased was receiving medication from the government clinic'.

(c) Lim Cheng Chuan also admitted during the cross-examination that 'there was material discrepancy in the description of the property' mentioned in the alleged will and that 'the instruction given by the deceased, ie, that the land was a rubber estate and that he had a share in the rubber estate, was wrong'.

(d) Another lawyer by the name of Lim Eu Keong (SP3) stated that he 'cannot remember whether the deceased knew the meaning of 'undivided share' … cannot remember whether the deceased corrected me about the rubber estate' and had said that the deceased 'did not say anything' and had 'kept quiet' even when the address in the alleged will, not being his place of residence or his address as stated in the identity card, was explained to the deceased.

(e) The evidence of the respondent that it was his mother who took the deceased to see the lawyer when she alleged that the deceased wanted to make a will.

(f) The evidence of the respondent that it was his mother who informed him that the deceased had made a will whereby he is named the executor of the will.

(g) The overall evidence shows that it was the respondent's mother who played an active part in persuading the deceased to draw the alleged will before the lawyer as chosen by the respondent's mother.

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[16] In the face of the irregular features of the alleged will, which we have highlighted, and in particular the acknowledgment of SP6 that the instruction given by the deceased was wrong, it is incumbent upon the respondent to establish affirmatively that the deceased did have the testamentary capacity at the time of the purported instructions or the purported execution. In the absence of any evidence, medical or otherwise, I find that the trial judge is not justified to place the burden of proof on the appellants when he held that the appellants have not adduced any medical report to show that the deceased lacked testamentary capacity or was insane at the relevant time.

KNOWLEDGE AND APPROVAL

[17] In their counterclaim, the appellants raised the issue as to the knowledge and approval of the deceased of the contents of the alleged will as apparent from the allegation therein that 'if, at all, the alleged will was executed by the deceased, which is denied, the deceased at the time of the alleged execution did not know and approve of the contents of the said will'. In their submission, the appellants stated that the deceased could not speak Malay, English or Chinese. The evidence of the appellants given during the trial is that the deceased's Hokkien was not a local Hokkien but that of Eng Choon Hokkien was with a heavy accent. According to the appellants the deceased was not able to hold jobs for a long time due to the fact that he could not communicate easily because he could only speak in Hokkien which was heavily accented. In fact, he could not have given the particulars of the land to the lawyer as he was not familiar with the English and Malay languages.

[18] *Tristram and Coote's Probate Practice*, (28th Ed, 1995) at p 658 states that in law, it is essential to the validity of a will that the testator should know and approve of its contents. *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (18th Ed, 2000), explains that a party who puts forward a document as being the true last will of the deceased must establish that the testator knew and approved of its contents at the time when he executed it. The testator's knowledge and approval of the contents of the will are part of the burden of proof assumed by everyone who propounds a testamentary document. *Tristram and Coote's Probate Practice*, (28th Ed, 1995) at p 659 further, states that the burden of proof of the testator's knowledge and approval lies on the party setting up the will and the burden is discharged prima facie by proof of capacity and due execution; but where this prima facie presumption is met by the cross-examination of the witnesses, the party propounding must prove affirmatively that the testator knew and approved of the contents.

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[19] I agree with the submissions of learned counsel for the appellants that since the appellants had clearly by their pleadings and evidence raised the issue as to the knowledge and approval of the deceased of the contents of the alleged will, it is incumbent upon the respondent, as the party propounding the alleged will, to prove affirmatively that the deceased knew and approved of the contents of the alleged will. The burden of proof on the respondent is heavier in the light of the acknowledgement by the respondent's own witness SP6 that there was a material discrepancy in the description of the property in the alleged will and that 'the instruction given by the deceased, ie that the land was a rubber estate and that he had a share in the rubber estate, was wrong'. Learned counsel further submitted that although the issue of knowledge and approval on the part of the deceased of the contents of the alleged will had been expressly pleaded and raised as an issue, the issue had not, however, been specifically addressed by the trial judge. This is indeed acknowledged in the submission of counsel for the respondent that the trial judge had 'dealt with the issue of knowledge and approval as part and parcel of due execution of the will by the deceased'. Incidentally, the trial judge had held that the deceased knew and approved of the contents of the alleged will when he signed the said will in front of several witnesses.

[20] *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (18th Ed, 2000) is clear that the law and case authorities are settled in that due execution cannot be equated with knowledge and approval as it is for the party propounding the will to prove affirmatively that the deceased knew and approved of the contents of the alleged will.

[21] Having considered the submissions of both parties, I have no difficulty in concluding that the respondent had failed to prove affirmatively that the deceased knew and approved of the contents of the alleged will on the following grounds:

(i) SP3 had under cross-examination admitted that he 'did not ask the testator to obtain his confirmation that he wanted the said will drawn up and executed' and that he 'did not find out from the deceased whether he understood English'.

(ii) SP3 cannot remember whether the deceased had said anything before or after the signing and cannot remember whether the deceased knew the meaning of 'undivided share' and cannot remember whether the deceased corrected him about the rubber estate.

(iii) SP3 had said that the deceased did not say anything and had kept quiet even when the address in the alleged will, not being his place of residence or his address as stated in the identity card, was explained.

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(iv) SP6 acknowledged that there was a material discrepancy in the description of the property in the alleged will and that the instruction given by the deceased, ie that the land was a rubber estate and that he had a share in the rubber estate, was wrong.

[22] The grave doubt that I have about the deceased's knowledge and approval of the contents of the alleged will is further highlighted by the fact that there is nothing in the attestation clause of the alleged will to indicate that the will was explained to the deceased, considering that the deceased was illiterate in English. SP3 admitted that there is nothing to show that he explained the contents of the will in Hokkien to the deceased. The absence of anything in the attestation clause to indicate that the will was explained to the deceased in Hokkien is serious enough to warrant my comment considering the strict requirements to be satisfied in respect of a will which contains no or insufficient attestation clause or a will which appears to be signed by a blind or illiterate testator before admitting the will to proof even in non-contentious probate proceedings under O 71 rr 9(1) and 10 of the Rules of the High Court 1980. Order 71 r 9(1) provides:

9 Evidence as to due execution of will (O 71 r 9)

(1) Where a will contains no attestation clause or the attestation is insufficient or where it appears to the Registrar that there is some doubt about the due execution of the will, he shall, before admitting it to proof, require an affidavit as to due execution from one or more of the attesting witnesses or, if no attesting witness is conveniently available, from any other person who was present at the time the will was executed.

Order 71 r 10 provides:

10 Execution of will of blind or illiterate testator (O 71 r 10)

Before admitting to proof a will which appears to have been signed by a blind or illiterate testator or by another person by direction of the testator, or which for any other reason gives rise to doubt as to the testator having had knowledge of the contents of the will at the time of its execution, the Registrar must satisfy himself that the testator had such knowledge.

[23] The rationale behind the strict requirements to ensure that there is no doubt about the due execution of the will or as to the knowledge of the contents of the will at the time of its execution had been addressed time and again. In *Kenward v Adams* (The Times 19 November 1975, Current Year Book 1975), Templeman J held that when a solicitor draws up a will for an aged or seriously ill testator, it should be witnessed or approved by a medical practitioner who ought to record his examination of the testator and his

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findings. *In re Simpson, deceased*, Vol 121 Solicitor's Journal, No 13, 1 April 1977, where the condition of the testator was not known to the solicitor, Templeman J in pronouncing against the validity of the will in issue was constrained to repeat the warning he had given in *Kenward v Adams* 'that the making of a will by an infirm testator ought to be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and findings' and that 'the Law Society would consider whether sufficient guidance was afforded to students and practitioners'.

[24] *In re Morris (deceased)* [1971] p 62, it was held that 'when it was proved that a will had been read over to or by a capable testator and he then executed it, prima facie, the inference would be that the testator knew and approved the contents, but that the court was not precluded from considering all the evidence to arrive at the truth, and that that was so not only if fraud but also if mistake was suggested; and that, although the testatrix was competent, did in a literal physical sense read the codicil and did duly execute it, it was clear from the evidence that she did not in fact know and approve its contents'. The court in that case cited with approval the headnote in *Fulton v Andrew* (1874–75) LR 7 HL 448:

> There is no unyielding rule of law (especially where the ingredient of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all farther inquiry is shut out.

[25] In the present appeal, it is not disputed that the deceased signed the alleged will in a coffee shop below the solicitor's office. The reason given by the respondent was that the deceased was too old to climb the stairs leading to the solicitor's office, but then there is evidence to show that the deceased was able to walk even to the bank. There is no doubt in my mind that though a will could be attested anywhere, it is unusual for the signing of a will which needed explanation and translation to an old man, to be executed in a coffee shop amidst all the noise from the customers. Secondly, the solicitor who came down to attest the said will was not the solicitor to whom the deceased had allegedly given instructions to draw out the will. The solicitor who attested the will was not an official interpreter. Thirdly, it is indeed questionable why the will had to be attested in the coffee shop where the court was not far away from the coffee shop and an official interpreter was available at the court. Lastly, the respondent claimed that the deceased complained to the respondent and his mother that he was treated badly by his own family. No other evidence was adduced by the respondent to corroborate that piece of evidence. Obviously, the appellants denied that allegation. The evidence shows that the deceased returned to his family's house every night and the respondent did not deny this fact. There is no evidence from

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the mother of the respondent that the deceased spent most of his time in her house or had his meals and slept there. In my view, the evidence that the relationship of the deceased with his family was bad had been raised by the respondent in order to justify why the alleged will had favoured the respondent. As can be seen from the evidence it was the respondent's mother who played an active part in involving the deceased in preparing the alleged will such as supplying the respondent's identity card to the lawyer.

[26] In the circumstances, I am of the view that the learned trial judge could not possibly have satisfied himself that the deceased, if at all, he had executed the alleged will, knew and approved of the contents of the alleged will. If at all, there had been due execution, the fact that the will had been explained to the deceased, or that the deceased signed the said will after the contents had been explained to the deceased or the fact that it is possible that the deceased could speak or understand Hokkien, does not, as a matter of law, furnish the affirmative proof that the deceased knew and approved of the contents of the alleged will.

SUSPICIOUS CIRCUMSTANCES

[27] The appellants had by their pleadings in the counterclaim raised the issue of suspicious circumstances in that 'the alleged will does not at all reflect the deceased's true will, intention and volition but was procured by the importunity of and/or determined by the respondent in consultation with his solicitors without the knowledge and/or approval of the deceased'. What is particularly disturbing about the suspicious circumstances is the undisputed fact that no file had been opened by the lawyer, SP6, although allegedly instructed by the deceased to prepare the will, that the notes containing the purported instructions had been destroyed and that the alleged will had the wrong particulars pertaining to the deceased's address and the deceased's property. In *Udham Singh v Indar Kaur* [1971] 2 MLJ 263, the Federal Court held that where suspicious circumstances had been raised, the onus should have been on the party propounding the will to explain them and that the trial judge had adopted 'a wrong approach to the question of onus' when 'assessing the suspicious circumstances only in the context of the plea of undue influence'. Further, in *Dr Shanmuganthan v Periasamy s/o Sithambaran Pillai* [1997] 3 MLJ 61, the Federal Court held that: 'At the close of the defendant's case there were numerous circumstances that clearly excited the suspicion of the court and these were still present and were not removed. The learned judge failed to consider any one of them and to ascertain if the burden under the law which required the defendant to prove his case had been discharged. Suspicious circumstances surrounding the emergence of the will were numerous. The circumstances were highly suspicious, abnormal and not normally expected in any ordinary situation or from a normal person.

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None of these suspicious circumstances was explained. The suspicions were not removed at all either after the witnesses gave their evidence or for that matter even after the close of the defendant's case'. In *Tyrrell v Painton* [1894] P 151, Lindley LJ said:

> It is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will.

[28] As the appellants had clearly by their pleadings and evidence 'raised the issue as to the suspicious circumstances surrounding or relevant to the preparation and execution of the alleged will', I find that there had been misdirection on the part of the trial judge in holding that it was unnecessary to deal with the suspicious circumstances as these 'have been considered and dealt with under the headings of testamentary capacity and due execution'. Apart from the misdirection on the part of the trial judge in failing to address the suspicious circumstances, it is clear that there had been no judicial appreciation of the evidence when the trial judge held that the suspicious circumstances 'were all circumstantial and some were mere conjectures and speculation'. Contrary to the trial judge's observation, I find that the suspicious circumstances surrounding or relevant to the preparation and execution of the alleged will are indeed factual and far too overwhelming to dispel having regard to the following:

(i) SP6's admission that the deceased did not personally make an appointment to see him on the alleged instructions and that it was the deceased's brother or his wife, Lim Too Eng (SP2) who made the appointment (it is to be noted these two people were the father and mother of the respondent).

(ii) No file was opened by the lawyer SP6 although allegedly instructed by the deceased to prepare the alleged will and by his own admission the notes bearing the deceased's instructions were destroyed.

(iii) The deceased's address in the alleged will being stated as 'No 1-E, Mk 16, Ayer Itam, Penang' and not as '14, Mk 13, Ayer Itam, Penang' as in the deceased's identity card although the deceased's identity card was checked by lawyer SP6 at the time of the purported instructions and checked and compared by lawyer SP3 at the time of the alleged execution.

(iv) The deceased's property was described in the alleged will as 'my undivided share in the rubber estate in Teluk Bahang, Penang known as Lot 83 and Lot 488 Mukim 2 South West District, Penang' although by SP6's evidence, he 'did not ask the deceased for proof of

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ownership' and that the deceased 'had no other documents' except his identity card at the time of the alleged instructions.

(v) SP6's acknowledgment under cross-examination that 'there was a material discrepancy in the description of the property' mentioned in the alleged will and that 'the instruction given by the deceased, ie, that the land was a rubber estate and that he had a share in the rubber estate, was wrong'.

(vi) SP3's inability under cross-examination to recall whether the deceased knew the meaning of 'undivided share' and 'cannot remember whether the deceased corrected me about the rubber estate'.

(vii) The alleged will being purportedly signed by the deceased in a coffee shop although the deceased had purportedly climbed the stairs to the lawyer's office to give instructions a few days earlier.

(viii) The question put by the respondent's counsel to the deceased's widow, Ong Sin Kheng (SD2), the third appellant, in cross-examination that the land title to the said property and the quit rent receipts were indeed kept by the deceased's brother, ie, the respondent's father.

[29] The appellants contended that what is no less disturbing and which would no doubt render the suspicious circumstances impossible to dispel is the seeming inability on the part of the respondent's witnesses, ie, Lim Cheng Chuan (SP6), Lim Eu Keong (SP3) and Ng Pooi Chee (SP5) to describe the appearance of the deceased, if at all, they had attended to him in some way. As against the description by the third appellant, Ong Sin Kheng (SD2), the deceased's widow, of the deceased as being 'tall and fair in complexion', 'not similar in looks to the brother, who was short'. Lim Cheng Chuan described the deceased as darker in complexion but was not sure of his height. Lim Eu Keong was not able to describe the deceased's features or height. Ng Pooi Chee (SP5) described the deceased as dark in complexion and similar in height and size to the deceased's brother.

[30] The respondent's counsel had, in his submission, acknowledged that the property being described as a rubber estate and the use of 'undivided share' in the said will were only one of those suspicious circumstances. The appellants' counsel further contended that the respondent had not dispelled the suspicious circumstances. The suspicious circumstances were aggravated further when SP3 (the respondent's mother) attempted to present the respondent as the adopted son of the deceased by tendering a testimonial dated 27 December 1996, certifying that the respondent was 'given for adoption by Eu Chin Eow ('the deceased') as his son', which was drawn up after the deceased's death on 10 December 1995 and signed only by the family members of the respondent. The respondent himself admitted that his

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relationship with the deceased and the deceased's family was far from close as he 'did not visit the deceased's family whenever I was in Penang', 'did not visit my uncle quite often or visit him at the hospital or attended his funeral' or 'paid respects after the funeral'. SP3 also attempted to present the said property in the alleged will as belonging to the respondent's father when she gave evidence that the property was purchased with funds belonging to her husband and that her husband was the owner.

[31] The appellants' evidence that the deceased was a good husband and a good father to the appellants and that the deceased could not communicate well with other people, was old-fashioned, conservative and extremely thrifty. The appellants gave evidence that the deceased had never mentioned anything about making a will or transferring the land stated in the alleged will.

[32] SP6 (the solicitor who drew up the will and to whom the deceased had allegedly given instruction to draw the will) gave evidence that no file had been opened and that the notes bearing the deceased's purported instructions had been destroyed. His eventual acknowledgement that 'the instruction given by the deceased was wrong' does give rise to the irresistible suspicion that the deceased may not after all have given his instruction on the alleged will. This evidence gives rise to suspicion that the will was not drawn on the instruction of the deceased but on the instruction of SP3 who was bent on getting the said property for her family.

[33] In this regard, the appellant's counsel had drawn my attention to the case of *Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457 where the credibility of the solicitor, Lim Cheng Chuan had been impugned in 'attestation of wills without the presence of a joint attesting witness' and 'his attestation of a will not correctly dated'. I find that the case cited by the appellant's counsel is relevant because the solicitor Lim Cheng Chuan in that case is SP6 in the present appeal. As can be seen from the evidence in the present appeal, SP6 had made the same errors as he did in the case cited to us. In *Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors*, the learned trial judge who heard the case commented on the evidence of Lim Cheng Chuan as follows:

> Where he testified that all wills were executed on 3 August 1992, meaning that no wills were executed after 3 August 1992, he then testified that the deceased executed a second Thai will after 3 August 1992 without the joint presence of witnesses and that he attested that will after 3 August 1992. Where he denied all knowledge of a second Thai will, he then rendered a saturated account of the second Thai will. *Evidently Lim [ie Lim Cheng Chuan] could invert his testimony with ease but without any scruples whatsoever.*

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However, the second Thai will was the irrefutable proof that the deceased executed more 'wills' than was pleaded by the first to third defendants. *It was revealing proof that Lim [ie Lim Cheng Chuan was not averse to his attestation of wills without the presence of a joint attesting witness*. It was also revealing proof that Lim [ie. Lim Cheng Chuan] was not averse to his attestation of a will not correctly dated — the second Thai will executed after 3 August 1992 was dated 3 August 1992.

Knowing that the deceased had signed the second Thai will without the joint presence of two attesting witnesses, he attested that the deceased signed the second Thai will in the presence of 2 witnesses. To say the least, that was highly irregular. Knowing that the second Thai will was executed after 3 August 1992, he dated it as 3 August 199. That was deceitful. *Sadly Lim, ie Lim Cheng Chuan, a senior lawyer called for the purpose of proving due execution could not be believed on his assertion that the 1992 wills were intact*. Clearly, due execution was not proved.

(Emphasis added.)

[34] Perusing the evidence of SP6 as a whole, I could not help but come to the conclusion that the evidence of SP6 was highly suspicious if not untenable. I am of the view that the evidence of SP6 is crucial in the present appeal to remove the suspicious circumstances in respect of the alleged will. In brief, the evidence of the respondent to remove any suspicious circumstances depends on the evidence of SP2, SP3, SP4, SP5 and SP6. SP6 gave evidence that he received instructions from the deceased to draw out the alleged will. From the evidence, it is clear to me that SP6 received instructions from SP2. SP2, the mother of the respondent, gave evidence that the property was not the property of the deceased but the property of her husband whose funds were used by the deceased to purchase the property, but nothing was adduced to substantiate this claim. From the evidence, I could not help but to conclude that it was SP2 who was more interested to have the property named in the will. It was SP2 who produced the identity card of the respondent to SP6. SP2 produced a testimonial that the respondent was the adopted son of the deceased but that testimonial was dated after the death of the deceased. Then there is evidence to show that the deceased executed the will in a coffee shop, if at all he did, rather than in the office of the solicitor (SP6). The evidence shows that the deceased did not sign the will in front of SP6 but in front of SP3. Bearing in mind that the deceased had difficulty in understanding Penang Hokkien, yet there was no official interpreter to interpret the will which is in English into Hokkien which was the dialect that the deceased understood. Further, how could SP3 explain the actual instructions given purportedly by the deceased since the instructions, if at all given, were given to SP6. As a result, there are discrepancies in the description of the said property.

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UNCERTAINTY

[35] It is the appellants' contention that there had been misdirection on the part of the trial judge in failing to appreciate that the alleged will is void on grounds of uncertainty or ambiguity as the deceased does not possess or own any rubber estate in Teluk Bahang nor does the deceased possess or own an undivided share in Lot 83 and Lot 488 Mukim 2 South West District, Penang. It is not in dispute that the deceased at the time of the alleged will was the registered proprietor of Lot 83 and Lot 488 Mukim 2 South West District, Penang. In the circumstances, and given the material discrepancy in the description of the property in that the deceased does not own an undivided share in the property mentioned, and in the absence of 'any evidence as to whether the deceased knew the meaning of undivided share, or his intention in respect of the property he owns', I find the alleged will to be uncertain or ambiguous. Consequentially, no probate could therefore be ordered or enforced in respect of the alleged will.

FORGERY

[36] The appellants had by their pleadings and in evidence raised the issue that the alleged will does not bear the true and genuine signature of the deceased and is a forgery and that the alleged will was procured by the importunity of and/or determined by the respondent without the knowledge and/or approval of the deceased.

[37] I have the opportunity of going through the judgment of the learned judge in respect of this issue. The only evidence by the appellants in respect of the forgery was the evidence of SD3 (the handwriting expert). I agree with the learned judge that the test carried out by SD3 was unsatisfactory because it was based only on one document and not several documents bearing the signatures of the deceased. In view of this, I am of the view that the learned judge was correct in holding that the appellants had failed to prove the signature of the deceased on the will was a forgery.

CONCLUSION

[38] Though I agree with the learned judge that the signature on the will was not a forgery, it does not mean that the respondent had succeeded in proving the will. The authorities show that where issues had been raised as to the testamentary capacity of the deceased testator or as to his knowledge and approval or suspicious circumstances, the onus is on the propounder, which is the respondent in this case. Having perused the record, it is clear to me that the respondent had failed to discharge this burden. The appellants had pleaded forgery of which I find that the appellants had not proved their case.

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In my view, the issue of forgery would come into play only after the respondent had discharged his burden of proof in respect of testamentary capacity. In the present appeal the respondent had failed to discharge the burden on him.

[39] For the reasons I have stated above, I will allow the appeal with costs here and below. The deposit is to be refunded.

Low Hop Bing JCA:

APPEAL

[40] On 16 September 2005, the learned judge of the Penang High Court ('the trial court'):

(1) allowed with costs the claim of the plaintiff-respondent ('the plaintiff') and decreed the grant of probate ('the probate') for the will of one Eu Chin Eow, deceased, ('the deceased') dated 26 November 1990 ('the will'); and

(2) dismissed with costs the counterclaim of the first, second and third appellants-defendants ('the defendants') seeking, inter alia, to set aside the probate.

[41] This is the defendants' appeal against the aforesaid orders.

THE PARTIES

[42] The plaintiff, the deceased's nephew, is the sole executor, trustee and beneficiary under the will.

[43] The first, second and third defendants are respectively the deceased's son, daughter and wife.

[44] The deceased died on 10 December 1995 at the age of 80.

BURDEN OF PROOF

[45] Defendants' learned counsel Mr JA Yeoh (Mr JJ Chan with him) submitted that there was misdirection by the trial court in placing upon the defendants the burden of proving the deceased's testamentary incapacity when the defendants were only required to question the deceased's mental capacity. They relied on *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 (CA).

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[46] Learned counsel Mr Ooi Soo Jit contended for the plaintiff that the trial court quite clearly has appreciated the law as it stood, referring also to *Lee Ing Chin*.

[47] It is to be noted that the trial court followed the judgment of Gopal Sri Ram JCA delivered for the Court of Appeal in *Lee Ing Chin* at p 113G–H, which where relevant merits reproduction as follows:

> It is settled law where the validity of a will is challenged, the burden of proving testamentary capacity and due execution lies on the propounder of the will as does the burden of dispelling any suspicious circumstances that may surround the making of the will. However, the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lies on those who challenge the will.

[48] In this context, the meaning of the expression 'testamentary capacity' has been set out by the Federal Court in *Udham Singh v Indar Kaur* [1971] 2 MLJ 263 at pp 264–265 in the following words:

> A person has testamentary capacity when he understands the nature of his act and its effect; the extent of the property of which he is disposing; the claims to which he ought to give effect; and, with a view to the latter object, no disorder of the mind must poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, and no insane delusion must influence his will in disposing of his property, and bring about a disposal of it which, if the mind had been sound, would not have been made. (*Bank v Goodfellow* (1870) LR 5 QB 565). (See also *Lee Ing Chin* at p 114A–C).

[49] The burden of proof in testamentary cases may shift from one party to another, as evident in the succinct statement delivered by Lord Brougham in *Waring v Waring* (1848) 13 ER 715 at p 720 as follows:

> The burden of the proof often shifts about in the process of the cause, accordingly as the successive steps of the inquiry, leading to inferences decisive, until rebutted, casts on one or the other party the necessity of protecting himself from the consequences of such inferences; nor can anything be less profitable as a guide to our ultimate judgment than the assertion which all parties are so ready to put forward in their behalf severally, that, in the question under consideration, the proof is on the opposite side. Thus, no doubt, he who propounds a latter will undertakes to satisfy the Court of Probate, that the testator made it, and was of sound and disposing mind. But very slight proof of this, where the factum is regular, will suffice; and they who impeach the instrument must produce their proofs, should the party actor, the party propounding, choose to rest satisfied with his prima facie case, after an issue tendered against him. In this event, the proof has shifted to the impugner; but his case may easily shift it back again. (See also *Lee Ing Chin* at p114 D–F).

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[50] The Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (FC) heard the appeal from *Lee Ing Chin*. At p 13 Steve Shim CJ (Sabah and Sarawak), delivering the judgment of the Federal Court held that the Court of Appeal had quite rightly stated the settled law. The Federal Court additionally adopted the instructive approach taken by the High Court of Australia (which is the apex court there) in *William Henry Bailey & Ors v Charles Lindsay Bailey & Ors* (1924) 23 CLR 558, where Issacs J stated in para (8) that, once the proponent establishes a prime facie case of sound mind, memory and understanding with reference to the particular will, for capacity may be either absolute or relative, the onus probandi lies upon the party impeaching the will to show that it ought not to be admitted to proof.

[51] In the light of the above authorities, I am of the view that there was no misdirection by the trial court in holding that the defendants bear the burden of establishing the deceased's testamentary incapacity as an extraneous vitiating element. It needs also to be observed that such burden of proof may shift from the challenger or impugner to the propounder as explained in *Waring*.

TESTAMENTARY INCAPACITY, DUE EXECUTION AND FORGERY

[52] The defendants alleged that the deceased's execution of the will was a result of testamentary incapacity, as the deceased was not of good health, sound mind, memory and understanding, being 75 years old and was suffering from senile dementia aggravated by his ill-health, and that the will has been forged.

[53] The plaintiff responded that the trial court had undertaken a tedious examination of the evidence and arrived at a correct finding that the will has been duly executed by the deceased.

[54] The plaintiff added that in the light of, inter alia, *Kameswara Rao v Suryaprakasarao* AIR 1962 AP 178; and *Lee Ing Chin*, the opinion of the handwriting expert SD3 must be treated with great caution.

[55] In the instant appeal, it is best to consider all the aforesaid issues together, as they are related but yet opposing to each other.

[56] The trial court had accepted the evidence adduced for the plaintiff through five witnesses viz SP2 to SP6. The cumulative effect of their evidence is that the deceased had given instructions for the will to be drawn up and that the deceased had duly executed the will.

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[57] In particular, Mr Lim Cheng Chuan (SP6), the solicitor who prepared the will, testified that the deceased had given instructions for him to prepare the will.

[58] Mr Lim Eu Keng (SP3), another solicitor, testified that on 26 November 1990, he witnessed the execution of the will and that a few days before the execution thereof, three persons viz the deceased, his brother Eu Chin Sam and Eu Chin Sam's wife (ie the deceased's sister-in-law) went to the law firm of SP3 and SP6 to give instructions to SP6 to prepare, inter alia, the will. The content of the will was explained by SP3 in the Hokkien dialect to the deceased in the presence of SP4 who is SP3's clerk. The deceased then executed the will.

[59] SP5 who was a friend of the deceased testified that he saw the execution of the will by the deceased in the presence of two attesting witnesses viz SP3 and SP4. SP5 also confirmed that SP2, the plaintiff's mother, was present at the same time.

[60] The defendants were not present when the will was executed by the deceased. However, they testified that the deceased's signature on the will could not have been affixed by the deceased.

[61] The trial court had evaluated the entire evidence adduced for the defendants to the effect that in 1990 at the time of the execution of the will, the deceased was neither in good health, nor of sound mind, memory and understanding being in depression, and had developed forgetful habits as he had started collecting rubbish, bottles, used cans and so on. The defendants however did not tender any medical evidence to support the deceased's testamentary incapacity, mental delusion, senile dementia or insanity at the time of the execution of the will. On the contrary, the deceased's daughter (SD1) under cross-examination confirmed that in November 1990, the deceased could walk around and could still go to the bank.

[62] SD2, another witness for the defendants, confirmed that from 1989 to 1991, the deceased was still able to go to the bank and record his banking transactions, and that the deceased went by himself to see his doctor in the 1990s.

[63] SD4's evidence was that on 24 November 1990 which was two days before the execution of the will on 26 November 1990, the deceased had signed Public Bank forms for the purpose of opening a fixed deposit account.

[64] Upon a careful consideration of the entire evidence adduced for both the plaintiff and the defendants, the trial court accepted as credible the

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evidence adduced for the plaintiff relating to the preparation and due execution of the will, there being no reason for the two solicitors viz SP3 and SP6 to tell lies in court.

[65] Next, the trial court considered the evidence of the handwriting expert SD3 who gave evidence for the defendants. SD3 testified that the deceased's signature in the will was forged, being of different authorship 'because of similarity in general form but difference in fine details'.

[66] The trial court found that the procedure adopted by SD3, in examining the samples given to him, revealed the following weaknesses:

(1) only one specimen signature ('the specimen signature') E1 was available for comparison with the signature on the will given to SD3 for examination;

(2) the specimen signature and the signature on the will were not signed at the same time; the former in 1995, while the will was signed in 1990, and SD3 confirmed that a person's signature varies slightly from time to time and that there would be subtle changes over a period of time;

(3) the specimen signature was affixed by means of a ballpoint pen while the signature on the will was not written by means of a ballpoint pen; and

(4) SD3 admitted that the author's signature may be affected by many factors such as 'temporary or permanent physical disorders, eyesight, degree of self-control, aesthetic taste, mental disturbances, changes due to sanity' as advocated in the article *Examination of Handwriting and Signatures* by Harcharan Singh Tara [1995] 3 MLJ i; but SD3 had not taken any of these factors into consideration when forming his opinion.

[67] The trial court also found that the defendants had failed to make a police report in connection with the alleged forgery of the will and so was not convinced of the credibility of the evidence adduced for the defendants.

[68] The immediate question that arises for determination herein is whether there is any appealable error on the part of the trial court to warrant appellate interference.

[69] In my judgment, it is to be noted that the question of whether the will has been forged is one of fact. The learned trial judge had the audio visual advantage of evaluating the evidence of the plaintiff's witnesses, in particular SP3, SP4, SP5 and SP6, who are disinterested witnesses testifying for the plaintiff. All these four witnesses have given direct evidence that it was the

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deceased who had executed the will. It is immensely important to specifically analyse the respective role of these witnesses.

[70] SP6 was the solicitor to whom the deceased had given instructions to prepare the will. He had testified that due execution of the will by the deceased was witnessed by two persons viz SP3, also a solicitor and the solicitor's clerk, SP4. The deceased's due execution of the will was at the same time effected in the presence of SP5 who was a friend of the deceased and was with the deceased. There was no evidence that any of these four witnesses were actuated by any ulterior motive or collateral purpose to induce them to concoct half-truths or untruths in relation to the respective sole played by them as adumbrated above.

[71] By way of comparison and contrast, the trial court found that the evidence adduced for the defendants were at best bordering on conjectures and speculations.

[72] I am of the view that the trial court's specific finding of facts based on the acceptance of the evidence adduced for the plaintiff as credible, in preference to the evidence adduced for the defendant, is free from any error.

[73] The trial court is correct in holding that the plaintiff, as the propounder of the will, has discharged the burden of proving due execution of the will.

[74] I shall now consider whether the defendants as the challengers or impugners of the will have succeeded in discharging the onus of establishing forgery as a vitiating element.

[75] In this regard, SD3's evidence as a handwriting expert must be viewed in the light of the evidence of the plaintiff's disinterested witnesses who had actually seen the signing of the will by the deceased and that the trial court has found these witnesses to be credible witnesses.

[76] A case in point is *Lee Ing Chin*, where the Court of Appeal after referring to *Newton v Ricketts* (1861) 11 ER 731; and *Kameswara Rao v Suryaprakasarao* AIR 1962 AP 178 enunciated the principle at p 137E as follows:

> We consider it to be well established general guide to the judicial appreciation of handwriting evidence that where there is a sharp conflict between the direct testimony of a disinterested witness on the one side and that of a handwriting expert on the other as to the genuineness of the execution of a document, then it is a safe course for a court to prefer the direct evidence.

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[77] On appeal, the Federal Court in *Gan Yook Chin*, affirmed the above sentiment expressed by the Court of Appeal. A

[78] The trial court had therefore correctly declined to accept SD3's evidence, and rightly held that the defendants had failed to discharge the burden of proving forgery. B

PRINCIPLES OF APPELLATE INTERVENTION

[79] The trial court had meticulously embarked upon a sufficient appreciation of the evidence adduced at the trial, by assessing, weighing and for good reasons, accepting the evidence of due execution adduced for the plaintiff as credible and meanwhile finding that the defendants have not discharged the burden of proving the testamentary incapacity of the deceased and forgery of the will. C D

[80] For this purpose, in *Lee Ing Chin* at p 116E–F, the Court of Appeal re-affirmed that:

> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think, appropriate that we say what judicial appreciation of evidence involves. E
>
> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. He must also test the evidence of a particular witness against the probabilities of the case. F G

[81] On appeal, in *Gan Yook Chin*, it was argued that the Court of Appeal had applied a new technique of 'insufficient judicial appreciation of the evidence' which was quite different from the established 'plaining wrong' test which merely required the court to look at the substance of the judgment as a whole and not a minute examination of the evidence of all the witnesses. The Federal Court at pp 10–11 held that the Court of Appeal: H

> ... had clearly borne in mind the central feature of appellate intervention ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate I

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upon a dispute must arrive at his decision on issues of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

[82] On the issues of testamentary incapacity, due execution and forgery, I apply the aforesaid principle and hold that there is no appealable error on the part of the trial court to warrant any appellate interference.

KNOWLEDGE AND APPROVAL

[83] The defendants complained that the trial court had failed to appreciate that the plaintiff has to prove affirmatively that the deceased knew and approved of the contents of the will, particularly:

(1) when the deceased could not understand the will which was written in the English language;

(2) the deceased's address in the will differed from that in his identity card;

(3) the deceased's property was described as "undivided share in the rubber estate in Teluk Bahang, Penang known as Lot 83 and Lot 488 Mukim 2 South West District, Penang", when the property was not a rubber estate and the deceased owned the whole property; and

(4) the deceased's daughter SD4 testified that the deceased could not have given the particulars of the property to the lawyers as the deceased did not have the title deed.

[84] The plaintiff stressed that the trial court had considered the evidence of the witnesses and correctly arrived at the conclusion that the deceased knew and approved of the contents of the will.

[85] The essence of the trial court's finding is that the solicitor SP6 had prepared the will accordingly as instructed by the deceased who came to his office a few days before 26 November 1990. The attesting solicitor SP3 had explained the contents thereof in the Hokkien dialect to the deceased. The deceased replied that he agreed with the contents and then signed the will. SP4 also confirmed this. The trial court found as illogical the suggestion that after residing in largely Hokkien-speaking Penang for almost 50 years, the deceased could not speak and understand Penang Hokkien. Further, the deceased's son, SD1, communicated with the deceased in simple Hokkien.

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[86] In my judgment, the description of the property as 'rubber estate' and 'undivided share' and the different addresses alluded to above are minor discrepancies which do not give rise to any doubt in relation to the identity of the property, as the material particulars such as the lot numbers, the mukim and the district have been accurately and specifically stated in the will. There is no uncertainty or ambiguity in the contents of the will. Hence, the validity of the will is in no way negated.

[87] The trial court's finding is based on the credibility of witnesses after embarking upon a proper judicial appreciation of the evidence adduced at the trial. I am unable to find any misdirection in this respect and so I must refrain from any appellate interference.

SUSPICIOUS CIRCUMSTANCES

[88] The defendants outlined the following circumstances to vitiate the will:

(1) SP6 who was instructed to prepare the will did not open any file and the deceased did not make any appointment with him;

(2) witnesses SP3 and SP6 could not describe the appearance of the deceased;

(3) the will was purportedly signed by the deceased in a coffee shop;

(4) the will was not in the possession of the deceased's family members but was instead in the possession of the plaintiff's mother;

(5) the plaintiff was merely a nephew of the deceased and had attempted to present himself as the deceased's adopted son;

(6) the deceased was poor, reserved and thrifty; and

(7) the deceased was a devoted husband and father to the defendants' respectively.

[89] The plaintiff relied on *Lee Ing Chin*, and contended that the plaintiff's burden of dispelling suspicious circumstances has been discharged by showing that the deceased knew and approved of the contents of the will.

[90] The trial court had dismissed the defendant's contentions as mere conjectures and speculations.

[91] In this regard, I am of the view that the answer to the defendant's submission is to be found in the followings passages.

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(1) A court of probate must first be satisfied that a testator understood the dispositions of a will, and that it was duly executed by him as his will. Once so satisfied, it is not concerned with the fairness of the will. A court must resist the natural temptation to set aside a will on the ground that it does not appear to be fair, equitable or just. (*Lee Ing Chin*, at p 140E (CA));

(2) It is not for us to fathom the motivations of a man. His actions and reactions are unpredictable as they depend upon so many circumstances. There is, however, always some dominant and impelling circumstances which motivate a man's action though in some cases even a trivial and trifling cause impels him to act in a particular way which a majority of others may not do. At times psychological factors and the frame of mind in which he is, may determine his action. (per Jaganmohan Reddy J in *Surendra Pal v Saraswati Arora* AIR 1974 SC 1999); and

(3) A man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing the court will not interfere with the exercise of his volition (*Motibai Hormusjee v Jamesetjee* AIR 1924 PC 28 at p 33 PC)

[92] As alluded to above, the plaintiff as propounder of the will bears the burden of dispelling any suspicious circumstance that may surround the making of the will.

[93] This burden may be discharged by showing that the deceased being of competent mind, had his will read over to him (*Fulton v Andrew* (1874–75) LR 7 HL 448) or that the deceased knew and approved of the contents of the will (*Tyrrell v Painton* [1894] P 151) (see *Lee Ing Chin* where at p 116B).

[94] Since the trial court had accepted the evidence of SP2 to SP6 and arrived at a specific finding of fact that the will has been read over to the deceased and the deceased understood the dispositions of the will, after which he had executed the will as his will, there is an end to any and all of the so-called suspicious circumstances and indeed all other collateral issues raised against the validity of the will (see *Lee Ing Chin*, (CA), at p 138G–H).

CONCLUSION

[95] On the foregoing grounds, I hold that the defendants' appeal is devoid of merits and is dismissed with costs. The orders of the trial court are hereby affirmed. Deposit to the plaintiff on account of taxed costs.

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Raus Sharif JCA:

[96] I have had the advantage of reading the judgments of my learned brothers, Mokhtar Sidin and Low Hop Bing JJCA in draft. I am in agreement with the conclusion of my learned brother Low Hop Bing JCA that this appeal be dismissed with costs.

Appeal dismissed with costs by majority.

Reported by Loo Lai Mee